No. 87-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROCKLAND INDUSTRIES, INC.,
Petitioner,

v.

JAMES CHUMBLEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals correctly apply to the particular facts of this diversity case the universally-accepted abuse of discretion standard in reviewing the trial court's decision to grant a new trial?

PARTIES TO THE PROCEEDINGS

Respondents and plaintiffs-appellants below are five individuals: James Chumbley, Thomas Lenchek, Michael Corke, Jo Yount, and Adrian De Bee. Petitioner and defendant-appellee below is Rockland Industries, Inc.

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Respondents (collectively "Chumbley") respectfully pray that this Court deny the petition for writ of certiorari seeking review of the judgment of the Court of Appeals for the Fourth Circuit.

Petitioner Rockland Industries, Inc. ("Rockland") distorts the decision of the court below and attempts to fabricate a conflict among the Circuits to justify review by this Court. This case, however, involves nothing more than the straightforward and routine application of the universally-accepted abuse of discretion standard to a trial court's decision to grant a new trial. This inher-

ently fact-specific question is of no significance beyond the confines of this particular litigation, a fact recognized by the court below when it concluded that there was no need even to publish its opinion.

There is no conflict among the Circuits. Each of the Circuits—like the court below—recognize that a new trial motion is committed to the discretion of the trial judge, but that the trial judge's decision may be reviewed for abuse of discretion.

The "Questions Presented," as framed by Rockland, are not even presented on the facts of this case. Rockland first asks whether an appellate court errs "when it fails to give any deference to a trial court's conclusions concerning credibility of witnesses and weight of the evidence." That is not what happened here. The court below gave all appropriate deference to the trial court, but according deference does not mean abdicating all review. The court below could not escape the conclusion that "the evidence in this record" did not permit the trial judge to overturn the unanimous jury verdicts on the basis of "his own strong assessment of the evidence." App. 15a.

Rockland next asks whether the Seventh Amendment permits a trial judge to order a new trial "when the interests of justice so require." Of course it does, and the court below did not rule to the contrary. "The interests of justice," however, do not require such action when—as the court below found to be the case here—"the evidence in [the] record * * * does not permit * * * negation of the jury's special verdicts." App. 15a.

STATEMENT OF THE CASE

Rockland's statement of the case ignores the significant aspects of the "voluminous" record below that led the jury to conclude that Chumbley was entitled to recover damages, and that led the Court of Appeals to conclude that the trial court erred in substituting its own view

of the facts for that of the jury. App. 14a. Since the decision below that the trial court abused its discretion turns on the particular facts in the record, it is necessary to consider those facts in greater detail.

In 1980, Chumbley developed a four-layer insulating fabric and magnetic-seal hardware system, known as "Warm Window," that can reduce wintertime window heat loss by over 80 percent. Chumbley later applied for and received a United States patent covering the Warm Window system. Chumbley's Warm Window rapidly achieved remarkable success, with a nationwide network of over 850 distributors by 1982. The volume of Warm Window sales also grew rapidly, reaching over $497,000 in 1981, and $1.5 million in 1982.

Then Chumbley met Rockland. In August 1982, a Rockland representative asked Chumbley to consider licensing to Rockland the rights to make and sell Warm Window products. During the course of subsequent negotiations, Rockland informed Chumbley that it was one of the largest manufacturers of window coverings in the world and that it possessed the capital and experience needed to continue expansion of the Warm Window market. Rockland's CEO stated during negotiations that he expected Rockland to increase Warm Window sales rapidly to at least $10 million per year.[1]

On October 26, 1982, the parties entered into an Exclusive Patent License Agreement. The Agreement gave

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[1] The District Court's memorandum opinion, entered four months after trial but prior to preparation of a transcript, erroneously states that Rockland's CEO denied making the $10 million projection. *See* App. 22a n.5. The trial transcript flatly contradicts the District Court's recollection of the testimony, as it does a number of other important factual assertions relied on in the memorandum opinion. The uncontradicted testimony of not only Chumbley but also one of Rockland's own witnesses confirmed the $10 million projection. *See* Transcript of Jan. 15, 1986, at 84-85; Transcript of Feb. 6, 1986, at 93.

Rockland the exclusive right to manufacture and market Warm Window products in return for Rockland's promise to pay Chumbley royalties and commissions on sales, computed according to various formulae established in the Agreement and subsequent amendments. To protect Chumbley's interests, the Agreement obligated Rockland to "diligently use reasonable efforts to promote the sale of the Products."

After Rockland took over responsibility for the Warm Window business, the consistent growth in sales came to an end. Instead of continuing to expand toward the $10 million annual sales projected by Rockland's CEO, Warm Window sales actually declined from their 1982 level during each of the three years following execution of the Agreement. That decline has continued since trial, with Warm Window sales in 1987 plummeting to less than one-third of their 1982 level.

Convinced that this decline was caused by Rockland's breach of the Agreement, Chumbley instituted this diversity action. Chumbley's principal claim was that Rockland had breached its express contractual obligation to "diligently use reasonable efforts" to market the products. Chumbley also claimed that Rockland still had not reimbursed him $7,700 for promotional expenses he had incurred in accordance with the parties' Agreement. Rockland, in turn, asserted a variety of counterclaims, all but one of which were dismissed prior to the end of the trial. That lone surviving counterclaim alleged that Chumbley had wrongfully induced Rockland to enter into the Agreement.[2]

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[2] Chumbley's complaint raised two additional claims that were resolved in his favor prior to submission of the case to the jury. First, Chumbley alleged that Rockland had failed to account for and pay him royalties and commissions on approximately $100,000 of sales that Rockland in fact had completed. During testimony before the jury, a Rockland corporate officer admitted that Rockland had underpaid royalties and commissions owed to Chumbley, and

Trial lasted six weeks, including twenty-one days during which the parties presented evidence to the jury. Chumbley presented testimony from five current or former Rockland employees, three sales representatives responsible for coordinating Rockland's Warm Window sales in various regions of the country, and several wholesale and retail distributors who handled Warm Window products both before and after Rockland's entry on the scene.

The testimony of those witnesses demonstrated not only that Rockland had failed to commit adequate resources and attention to marketing Warm Window products, but also that Rockland had breached its contractual obligation by engaging in four specific types of conduct: (1) Rockland's CEO changed the name of Warm Window products, without any advance market research or follow-up advertising, and despite strong objections from both the distributor network and Rockland's own marketing personnel; (2) Rockland began marketing an inferior, competing insulated window covering product, causing confusion among distributors and interfering with their marketing of Warm Window products; (3) Rockland's own advertising manager admitted that many advertising efforts for Warm Window products had been disorganized and mismanaged, leaving Warm Window, in his words, "one of the best kept secrets" in the industry; and (4) Rockland assigned promotional and marketing responsibilities to persons who either were admittedly incompetent or had a direct financial incentive to promote

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that admission led to a court-supervised settlement of the claim. Second, Chumbley alleged that Rockland had wrongfully departed from the Agreement in calculating royalties and commissions on one category of Warm Window sales. At the close of evidence, the District Court entered a directed verdict for Chumbley on that claim. Rockland did not appeal from the judgment on that directed verdict.

competing products at the expense of Warm Window sales. The jury also received testimony from a qualified marketing expert, who explained why each practice described above was unreasonable and necessarily would have an adverse effect on Warm Window sales.

On the issue of damages, Chumbley presented testimony from a second expert, economist Linda McLaughlin. The District Court accepted McLaughlin as a qualified expert based on her education as an economist, her current position as a vice president with National Economic Research Associates, and her past experience calculating economic damages in approximately forty other cases. McLaughlin placed before the jury damages calculations arrived at in accordance with standard economic methodology, based on (1) an analysis of Warm Window sales before and after Rockland took responsibility for the business, and (2) an evaluation of the sales performance of related products as well as more general factors affecting the Warm Window market.

After two days of *voir dire* examination and cross-examination concerning McLaughlin's methodologies, the District Court ruled that "an opinion has been fairly given" as to two different damages calculations, one based on an assumption of a "flat" development of the Warm Window market ($1,020,510), and the second based on an assumption that the Warm Window market would experience growth in accordance with the overall window coverings industry ($1,531,572). Transcript of Feb. 4, 1986, at 78, 121, 129. Thus, at the time of trial, the District Court specifically rejected Rockland's efforts to preclude or strike McLaughlin's testimony, ruling:

> I'm satisfied under Maryland substantive law that damages have [been] proved to a certainty and indeed I think they've been proved well enough. The testimony is admissible.
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> • • • •

> I do have some questions about it. I have some factual questions but they're not for me to resolve, they're for the jury to resolve. [Transcript of Feb. 4, 1986, at 77.]

Later, in rejecting Rockland's motion for a directed verdict, the District Court again specifically addressed Rockland's objections to McLaughlin's testimony, and concluded they were "for the jury in my judgment, not for me, * * * the evidence was properly admitted." Transcript of Feb. 5, 1986, at 149.

Based on a review of evidence submitted by both sides, including McLaughlin's testimony, the jury returned a verdict in Chumbley's favor on all counts. A review of the special verdict form, reprinted in full by the Court of Appeals, App. 9a-12a, demonstrates that the jury plainly understood the issues presented. The jury (1) specifically found that Rockland had breached its "reasonable efforts" obligation, (2) awarded Chumbley $1,000,000 to compensate for that breach, (3) awarded Chumbley an additional $7,700 for promotional expenses not yet reimbursed by Rockland, and (4) rejected Rockland's misrepresentation counterclaim.

The District Court thereupon granted Rockland's post-trial motion for judgment n.o.v., entered judgment for Chumbley in the amount of $1, and conditionally granted Rockland's motion for a new trial should the judgment n.o.v. be reversed on appeal. The Fourth Circuit reversed the judgment n.o.v. and the conditional grant of a new trial, directing that judgment be entered for Chumbley in accordance with the jury verdicts. App. 14a-15a.

Rockland does not here dispute that the District Court erred in most of its post-trial rulings setting aside the jury verdicts. Rockland does not contest the Fourth Circuit's unanimous decision to reverse the District Court's entry of judgment n.o.v. on the jury's award of $1,000,000 compensatory damages for Chumbley's principal claim.

See Pet. at 4. Nor does Rockland contest the appellate court's reversal of the judgment n.o.v. and alternate new trial order entered by the District Court *sua sponte* on the $7,700 claim, or its rejection of Rockland's argument on appeal that the District Court's order should be read to set aside the verdict in Chumbley's favor on the counterclaim. *See id.* at 3 n.1. Instead, while apparently conceding that the Fourth Circuit acted correctly in reversing the District Court on each of these points, Rockland maintains that the appellate court erred in reversing the District Court's new trial order.

There appears to be considerable confusion over what the District Court's new trial order meant to accomplish. Rockland suggests that the District Court intended to order a new trial on "all issues." *See id.* at 3. The Fourth Circuit—recognizing that the District Court was not explicit in its rulings—concluded that "the district court did not set aside plaintiffs' entitlement, as the result of the jury's answers to the special questions, to judgment as to liability" on Chumbley's "reasonable efforts" claim. App. 4a; *accord* App. 13a. Thus, unlike Rockland, the court below read the District Court's order to grant a new trial *solely* on the issue of damages. The Fourth Circuit nevertheless reviewed the evidence on the issue of liability, concluding "there was clear evidence to support the jury's special verdicts in favor of plaintiffs concerning liability," based on "each and all" of the four criticisms of Rockland's marketing practices advanced by Chumbley at trial. App. 13a-14a.

In reviewing the District Court's new trial order as to damages, the court below, citing decisions from the Fourth and other Circuits, applied the abuse of discretion standard.[3] The Fourth Circuit first noted that the

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[3] *See, e.g.*, App. 9a (" 'the action of a district court in granting a new trial is to be reversed only upon a showing of abuse of dis-

District Court's post-trial comments concerning McLaughlin's damages testimony differed substantially from the evaluation provided by the trial judge himself during and shortly after that testimony. App. 14a. The trial judge's post-trial memorandum opinion offered no explanation whatever of what factors, if any, caused him to abandon his first-held position that McLaughlin's testimony was both properly admitted and adequate to prove damages.

The Fourth Circuit then noted, consistent with the District Court's own position at trial, that McLaughlin's testimony provided a sound evidentiary basis upon which "a jury could have awarded damages not only of $1,000,000 but, under certain of the approaches relied upon by plaintiffs, in excess of $1,000,000." App. 14a. The court below recognized that the district judge had to "grapple with his own strong assessments of the evidence," but concluded that "the evidence in this record, as in *Abasiekong*, simply does not permit this court to permit negation of the jury's special verdicts." The Fourth Circuit's review of the "voluminous" record thus compelled a conclusion that this was a case in which the District Court had abused its discretion in rejecting the jury verdicts and ordering a new trial. App. 14a-15a.[4]

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cretion' ") (quoting *Abasiekong* v. *City of Shelby*, 744 F.2d 1055, 1059 (4th Cir. 1984)); App. 5a (abuse of discretion review of grant of new trial) (citing *Midcontinent Broadcast Co.* v. *North Central Air, Inc.*, 471 F.2d 357 (8th Cir. 1973)).

[4] After receiving the Fourth Circuit's mandate and a motion for relief from judgment filed by Rockland, but before acting to enter judgment as directed by the mandate, the trial judge recused himself from the case. He observed in a memorandum to counsel that "I question my own ability to be impartial in making any further rulings." Mem. to Counsel, Civ. No. JFM-84-3237 (Jan. 13, 1988). The case has been reassigned to another judge.

REASONS THE PETITION SHOULD BE DENIED

I. There Is No Conflict Among The Circuits.

The Circuits are unanimous in holding that a district court's decision on a motion for new trial is subject to appellate review under the familiar "abuse of discretion" standard.[5] Rockland itself concedes that "each of the Circuits will review a trial court's grant or denial of a new trial motion not only for errors of law, but also for an 'abuse of discretion' * * *." Pet. at 12.

Rockland contends, however, that this Court has never confirmed the appropriateness of such review. *Id.* Given the complete unanimity among the Circuits on the issue, there would seem to be little reason for this Court to do so. This Court's limited resources are expended on certiorari to resolve conflicts among the Circuits, not to confirm unanimous and well-established understandings.

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[5] *See, e.g., Coffran* v. *Hitchcock Clinic, Inc.*, 683 F.2d 5, 6-7 (1st Cir.) (reversing district court order granting new trial upon finding of abuse of discretion), *cert. denied*, 459 U.S. 1087 (1982); *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532, 541 (2d Cir. 1965) (same), *cert. denied*, 382 U.S. 983 (1966); *Grove* v. *Dun & Bradstreet, Inc.*, 438 F.2d 433, 438 (3d Cir.) (same), *cert. denied*, 404 U.S. 898 (1971); *Abasiekong* v. *City of Shelby*, 744 F.2d 1055, 1059 (4th Cir. 1984) (same); *Conway* v. *Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360, 367 (5th Cir. 1980) (same); *Manning* v. *Altec, Inc.*, 488 F.2d 127, 133 (6th Cir. 1973) (same); *Marshall's U.S. Auto Supply, Inc.* v. *Cashman*, 111 F.2d 140, 141 (10th Cir. 1940) (same); *Williams* v. *City of Valdosta*, 689 F.2d 964, 974 (11th Cir. 1982) (same); *Taylor* v. *Washington Terminal Co.*, 409 F.2d 145, 149 (D.C. Cir. 1969) (same); *General Foam Fabricators, Inc.* v. *Tenneco Chemicals, Inc.*, 695 F.2d 281, 288-289 (7th Cir. 1982) (reviewing district court order granting new trial under abuse of discretion standard); *Russell* v. *United Parcel Service, Inc.*, 665 F.2d 1188, 1191 (8th Cir. 1981) (same); *Fount-Wip, Inc.* v. *Reddi-Whip, Inc.*, 568 F.2d 1296, 1302 (9th Cir. 1978) (same); *Mainland Industries, Inc.* v. *Standal's Patents Ltd.*, 799 F.2d 746, 749 (Fed. Cir. 1986) ("Appellate review of a motion for new trial is conducted on an abuse of discretion standard").

In any event, this Court *has* confirmed the appropriateness of appellate review of new trial decisions. The very decision on which Rockland so heavily relies, *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33 (1980), considered the propriety of reviewing on mandamus an order granting a new trial on the ground that "the evidence did not support the amount of the jury award." *Id.* at 33. This Court held mandamus was inappropriate precisely because "[a] litigant is free to seek review of the propriety of such an order on direct appeal after a final judgment has been entered." *Id.* at 36. That is precisely what Chumbley did here, and what the Circuits uniformly permit litigants to do. Rockland's radical suggestion that such orders should be wholly unreviewable has thus been rejected by this Court and every Circuit.[6]

Rockland concedes as much, arguing that "[a]lthough all appellate courts nominally purport to apply an 'abuse of discretion' standard," they really do something else. Pet. at 9. The issue, according to Rockland, reduces to whether the abuse of discretion standard "should be maximally or minimally deferential." *Id.* There is no confusion among the Circuits over how to apply the familiar abuse of discretion standard. Application of the standard turns on the particular factual circumstances

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[6] *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474 (1933), on which Rockland relies, is not to the contrary. The Court in that case simply confirmed that the decision on a new trial motion is "within the discretion of the trial court," *id.* at 482, which is true of any matter nonetheless subject to full appellate review for abuse of discretion. Indeed, the Court in *Fairmount* expressly noted that it had "no occasion to determine" in the case before it whether the new trial decision was subject to review for abuse of discretion. *Id.* at 485. In the other case on which Rockland relies, *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940), this Court expressly held that there had been no showing of abuse of discretion. *Id.* at 247. It is also significant that both *Fairmount* and *Socony-Vacuum*—unlike the present case—involved review of a district court's *denial* of a new trial motion.

of each specific case, the record before the court, the conduct of the trial below, the nature of the evidentiary or other factual issues in dispute, and countless other factors that vary from case to case. In some cases the peculiar factual circumstances may call for maximum deference; in others, minimal deference. Rockland confuses application of a uniform standard of review to diverse factual situations—with differing results depending on the facts—with disagreement over the standard itself.

The very cases on which Rockland relies prove that there is no disagreement over application of the abuse of discretion standard. For example, Rockland cites *Harris* v. *Quinones*, 507 F.2d 533 (10th Cir. 1974), as epitomizing a highly deferential approach. Pet. at 6. In supposed contrast, *J & H Auto Trim Co., Inc.* v. *Bellefonte Insurance Co.*, 677 F.2d 1365 (11th Cir. 1982), evinces a non-deferential approach, involving independent review of the record. Pet. at 7. It was the "deferential" court in *Harris*, however, that undertook a "careful review of the entire record," 507 F.2d at 536, and it was the "non-deferential" court in *J & H Auto Trim* that expressly recognized that a new trial order "was an exercise of the trial court's discretion and our review must be limited accordingly." 677 F.2d at 1373. The courts did not differ in their approach to the routine question of whether the trial court abused its discretion, but appropriately reached different results on the different facts of the distinct cases before them.[7]

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[7] Even if the conflict asserted by Rockland existed—and it does not—the present case would hardly be an appropriate vehicle to address it. Nothing in the opinion below suggests exacting appellate scrutiny, and the court did not employ any. Indeed, while Rockland's "Questions Presented" and its asserted conflict hinge on "[a]ppellate invocation of the Seventh Amendment in order to justify more stringent review over new trial orders," Pet. at i, 17, the court below did not even *cite* the Seventh Amendment, let alone rest its analysis on it. *See, e.g., The Monrosa* v. *Carbon Black Ex-*

What Rockland views as internal conflict within the Circuits is again nothing more dramatic than the application of the familiar abuse of discretion standard to widely differing factual circumstances. Indeed, Rockland is compelled to acknowledge that the Fourth Circuit, in an opinion published two weeks before the unpublished memorandum below, reiterated the very approach that allegedly "conflicts" with that below. Pet. at 8-9. The appropriately deferential approach of *Johnson* v. *Parrish*, 827 F.2d 988 (4th Cir. 1987), however, is wholly consistent with a long line of Fourth Circuit precedent recognizing the deference due the decision of a trial court on a new trial motion. *See, e.g., Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F.2d 350, 354 (4th Cir. 1941); *Williams* v. *Nichols*, 266 F.2d 389, 393 (4th Cir. 1959); *Wyatt* v. *Interstate & Ocean Transport Co.*, 623 F.2d 888, 891-892 (4th Cir. 1980); *Abasiekong* v. *City of Shelby*, 744 F.2d at 1059. The unpublished decision below hardly departed from this well-established approach; indeed, the court below cited these cases in its analysis. App. 6a-9a.

Rockland's position is flatly contradicted not only by every Circuit Court of Appeals, but by the Federal Rules of Civil Procedure as well. Not surprisingly, Rockland does not even cite the pertinent rule. Rule 50(c) specifies that when a district court enters judgment n.o.v. and conditionally grants a new trial, and the judgment is reversed on appeal, "the new trial shall proceed *unless the appellate court has otherwise ordered.*" Fed. R. Civ. P. 50(c)(1) (emphasis supplied). As the Advisory Committee Note explains:

> The party against whom the judgment n. o. v. was entered below may, as appellant, besides seeking to

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port, Inc., 359 U.S. 180 (1959), where this Court was compelled to dismiss a writ of certiorari as improvidently granted, when the broad question presented in the petition turned out not to be presented in the case.

> overthrow that judgment, *also attack the conditional grant of the new trial.* And the appellate court, if it reverses the judgment n. o. v., may in an appropriate case also *reverse the conditional grant of the new trial and direct that judgment be entered on the verdict.* [31 F.R.D. 645 (emphasis supplied) (citing, *inter alia, Lind* v. *Schenley Industries Inc.*, 278 F.2d 79 (3d Cir.), *cert. denied*, 364 U.S. 835 (1960), criticized by Rockland at Pet. 17).]

In *Neely* v. *Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 323 (1967)—again not even cited by Rockland—this Court confirmed that Rule 50(c) "contemplates that the appellate court will review on appeal * * * the trial court's conditional disposition of the motion for new trial. This review necessarily includes the power to grant or to deny a new trial in appropriate cases." Rockland's suggestion that appellate review of new trial decisions is somehow unwarranted has thus been definitively rejected by the Federal Rules and this Court.

II. The Highly Fact-Specific Decision Below Was Correctly Decided, And Has No Significance Beyond The Confines Of This Case.

The only issue in this run-of-the-mill case is whether the court below correctly applied the abuse of discretion standard to the trial judge's actions, in light of the particular facts in the record. As this Court held long ago, "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

The fact that nothing more dramatic is at issue was confirmed by the court's determination that nothing in its disposition even warranted publication of an opinion. The Fourth Circuit publishes an opinion if it

> establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or it involves a legal issue of continuing public interest; or it criticizes

> existing law; or it contains an historical review of a legal rule that is not duplicative; or it resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit. [Fourth Circuit Internal Operating Procedure 36.3.]

The disposition of this case by the Fourth Circuit, as that court recognized, is of moment only to these particular litigants. It presents no issues of broader significance justifying expenditure of this Court's limited resources on certiorari.

In any event, it is clear that the decision below is correct. Rockland does not challenge the determination below that the District Court erred in granting judgment n.o.v. Pet. at 4. The District Court, in explaining its alternative grant of a new trial, concluded that "one factor is paramount. * * * [T]here was absolutely no reason for Rockland not to exercise reasonable efforts to market Warm Window." App. at 26a-27a. As the Court of Appeals explained, however, the District Court was plainly wrong. There was evidence in the record that "Rockland marketed and promoted competing products" and that "Rockland assigned promotional and marketing duties in connection with [Warm Window] products to persons who either had reasons to give promotional preference to products other than [Warm Window] products or who were not persons competent to perform such duties." App. 12a. With respect to Chumbley's expert witness on damages, the District Court admitted her testimony only after, in the words of the Court of Appeals, "a lengthy voir dire, which featured full, probing direct examination and cross-examination." App. 13a. The District Court itself initially recognized that the issues raised by the expert were "not for me to resolve, they're for the jury to resolve." App. 14a.

The Court of Appeals tactfully recognized that the District Court had a "strong preference" for Rockland's position and was compelled "to grapple with his own

strong assessments of the evidence * * *." App. 14a, 15a. The appellate court's perceptive understanding was confirmed when its mandate directing reinstatement of the jury verdict returned to the District Court. The trial judge recused himself, noting that "I question my own ability to be impartial in making any further rulings."[8] The objective and impartial review of the Court of Appeals, according all appropriate deference to the District Court, was clearly correct.

This Court will grant certiorari "only when there are special and important reasons therefor." S.Ct. Rule 17.1. The unpublished per curiam decision below, applying to the particular facts of a voluminous record a familiar legal standard accepted by each of the Circuits, clearly does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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[8] Mem. to Counsel, Civ. No. JFM-84-3237 (Jan. 13, 1988).